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ABSTRACT

To determine the treatment of visual journalism by privacy law from the origins of privacy law in 1890 until 1978, an analysis was made of the mass media legal cases occurring between those years. The cases were subjectively divided into three categories: those that established or extended a freedom of the press or the right of a defendant to gather, store, or disseminate information; those that limited or narrowed the right of the press or defendant to gather, store, or disseminate information; and those cases that did not relate to the question or were neutral. The cases were then coded for visual content: sketches, photographs, newsreels, cartoons, nonadvertising posters, documentary movies, and television news and documentaries. The analysis supported the statements that privacy law grew out of a response to visual journalism and that the law of privacy as it affects journalism is primarily visual. In addition, the privacy law was more restrictive of visual than of print journalism. Over 80% of all restricting privacy cases pertained to visual journalism. The results suggest that a lack of distinction between the forms (channels) of the invasion of privacy has obscured its historical origins and made the law of privacy more murky and more restrictive. (HOD)

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PRIVACY LAW AS IT AFFECTED JOURNALISM, 1890-1978: PRIVACY IS A VISUAL TORT

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INTRODUCTION

First amendment scholars have spent much time and ink examining the attitude of various courts toward exceptions to the First Amendment protection of freedom of the press. Absolutists tend to lump all information transfer under the First Amendment umbrella, while proponents of balancing First Amendment concerns against other state interests tend to divide expression into various categories that lend themselves to rational theories.

Categories that have gained acceptance include various definitions of obscenity, libel and threats to the security of the state--which have been considered unprotected by the First Amendment. (1) Categories that have received various degrees of protection include speech, commercial speech, entertainment, and political expression. (2) Some of these categories are created by content divisions (obscenity, libel, security threats, advertising and political expression); others, more by purpose (entertainment, commercial speech, symbolic speech, fair comment, obscenity when it is pandering, and treason); and others by effect (judicial contempt and the clear-and-present-danger test).

This work examines another less obvious typology that has been operating on judicial treatment of

expression. This line of categorization is by channel, channel in the same sense as that used in the classic Shannon-Weaver model and its extensions into the Communicator/Channel/Message/Noise/Receiver/Effect paradigm used by communication scholars. (3) The question is, has the law made distinctions in terms of channel? This paper specifically examines the treatment of visual journalism by privacy law from the origins of privacy law until 1978. Has the treatment been different? If so, has the law created preferred or less preferred channels of expression? If so, what effect has that difference had on visual news mediums and press law as a whole?

Although there has been no previous discussion of the visual non-visual distinction as such, differential legal treatment of the various mediums of expression has been accepted for some time. As early as 1941, Zechariah Chafee, Jr., noted it and indicated that the judges were slow the protect new forms of communication. (4) Both John D. Stevens (5) and John Murray (6) have noted that it exists.

This paper has been extracted from a dissertation which has examined several areas of the law in the following manner and found differing results for different areas of the law. (7)

The question was operationalized by generating a comprehesive list of mass media cases, coding them and analyzing them statistically and historically. The cases were gathered using traditional methods of legal research. Then, the cases were subjectively divided into three categories: those cases that established or extended a freedom of the press or the rights of a defendant to gather, store or disseminate information; those cases that limited or narrowed the right of the press or defendant to gather, store or disseminate information; and those cases which did not relate to the question or were neutral. (8) Privacy cases which were ruled not privacy but were libelous were also coded as "extending." Then the cases were coded for visual content in the publication or issue. These coded for visual included the forms of sketches, photographs, newsreels, cartoons, non-advertising posters, documentary movies and television news and documentaries. (9) A coder reliability check using Scott's Pi was done. Intercoder reliability was .92.

The cases were analyzed for statistical significance by using the chi-square test. (10) The rows and columns were analyzed by using the binomial two-tailed test with a continuity correction. (11) Chi square analysis was not considered valid for any table where the expected frequency in any cell is less that 5. (12) When the number of cases in any binomial test was 25 or less, the small sample

procedure was used testing the smaller of the observed frequencies. (13) Statistical significance was set at .05. The cases were then examined in their historical context to ascertain if any patterns were present.

This inquiry has required that visual journalism law be separated from other case law and examined along its own strand. Although this process involved some departures from standard theories of the law, it has followed paths established by many historians and is particularly acceptable in the area of legal history. Leading legal historian J. Willard Hurst of Wisconsin has trained his students to observe the effect of the cases rather than follow the legal reasoning. (14)

ORIGINS OF PRIVACY LAW

Growth from Copyright

The legal origins of American patent law, copyright and parts of privacy law all stem from the concept of property as it developed in England. (15) A corrollary to copyright law is the common-law right to control work that is not yet published and to prevent its publication. This concept of "intellectual property" and the right to prevent its publication became one of the early strands of privacy law. The concept of "ownership" of private letters and the right of an "owner" to publish or to prevent publication was quoted often in early privacy cases.

University of California Law School Dean William L. Prosser has separated the law of privacy into four distinct torts: appropriation, publication of private facts (disclosure), false light and invasion-trespass. (16) The ownership of private letters (literary property) became the tort of disclosure while the "copyright" aspect became appropriation. (17) The other two torts of privacy, false light and invasion-trespass, spring from the separate strands of the law of defamation (18), and trespass and intentional infliction of emotional distress (19).

Dean Prosser ends his 1960 review of privacy law with the comment that the publicity about the wedding of the daughter of Samuel D. Warren was the impetus for the birth of the hydra-headed concept known as "privacy" in law. He commented that the daughter must have been beautiful because hers "was the face that launched a thousand lawsuits." (20) Prosser was incorrect on one part of this statement and it is likely he was incorrect on the second. It was not the daughter of Samuel Warren but Samuel Warren himself whose marriage to the daughter of the prominent Senator Bayard sparked the article. (21)

It is also possible that it was not just the ire of the Warren family and friends at unwarranted publicity but the onset of "candid camera" journalism that evoked the law of privacy.

Impetus of Visual Journalism

The New York legislature passed the privacy statute in response to the furor following the rejection of a common law right to privacy for a picture. (22) It was a simple protection of the name and likeness of an individual from commercial exploitation. This law embodied what was later to be known as the tort of appropriation. (23)

The need for the 1903 New York statute was to protect the portrait and likeness of persons. (24) It was not necessary to protect the name of someone from commercial exploitation because the common law protected one's name under the law of literary property. This right had already been recognized by New York law in 1891, when a doctor recovered for false use of his name in a patent medicine ad. (25)

So what still needed protection? The image of a person taken by a camera not hired by that person.

The law had already established that photographs taken for hire were owned by the sitter. (26) If the sitter did not pay for the photograph then it belonged to the taker, who could copyright it. (27) However, the state of the art of photography now allowed for candid and "flash" pictures that did not require the cooperation of the subject.

The candid photograph and the illustrated newspaper which characterized the era of the Yellow Press or the Gilded Age journalism (28) did not mechanically merge until 1897 according to journalism historians. However, the use of the photograph upon which to base woodcuts or zinc gravures (Zincographs) was used by Pulitzer by 1885 and the term "from an on-the-spot sketch (or photograph)" was well known by 1890. (29)

The fear of these developments was clearly stated by Warren and Brandeis in their legendary 1890 law review article, "The Right to Privacy". (30) Warren and Brandeis said:

> From corporeal property arose the incorporeal rights issuing out of it, and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.
>
> This development of the law was inevitable. . . .
>
> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "What is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspaper, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago directly involved the consideration of the right of circulating portraits; and the question of whether our law will recognize and protect the right to privacy in this and other respects must soon come before our courts for consideration.

> . . . But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. (31)

The confluence of several kinds of law into privacy has confused the law and those who study it. Warren and Brandeis had three targets for their new right of privacy: commercial use of likeness, press gossip in both print and illustrated form, and eavesdropping by mechanical means. In their article they listed limitations on the right of privacy which included "consent and previous self-publication," "privileged" communications as defined by the law of libel and slander, and the broadest protection in terms of the press, "any publication of matter which is of public or general interest." While they condemned any publication of a private portrait in the newspaper, they gave blanket protection to newsworthy information. In general, this last provision has been used to protect the print press from any privacy actions that involved truthful accounts or accounts clearly in the

public interest that had minor inaccuracies. (32) In the next 80 years, from 1890 to 1970, the law of privacy expanded to include protection from the first and third evils that were targets of the article, commercial use and eavesdropping. Commercial use began to confine itself to what is now called appropriation, where there is monetary damage to a person. (33) However, the areas of false light and publication of embarassing private facts also expanded to include the visual presentation of news.

If this use of the candid picture and the rise of illustrated journalism were an impetus to the creation of the law of privacy, does the law of privacy reflect that privacy may be a visual tort? Does the law of privacy reflect a bias against visual infringements? An examination of existing case law was made by both statistical and historical analyses. Both indicated that the law of privacy developed as a visual tort, and that the law has a bias against visual infringements.

STATISTICAL ANALYSIS

Traditional methods of historical research produced mass media related privacy cases from 1811 to 1978. Then all cases relating to product advertising were dropped. This left 209 cases of which 149 involved pictures and 60 were non-visual. (See Table 5.) Forty-nine of the picture cases restricted freedom of the press and twelve of the non-visual cases restricted it.

Table 5. MEDIA PRIVACY CASES

	Extended	Limited	totals
Visual	100	49	149*
Non-visual	48	12	60*
totals	148*	61*	209

Chi-square = 3.4655, $p<.10$; * binomial tests $p<.005$.

The chi-square analyses of all privacy cases indicated marginal statistical significance at $p<.10$. However, the binomial tests indicated that both the visual/non-visual distinctions and the extended/limited freedom of the press differences were very significant ($p<.005$). Thirty-three percent of the visual cases limited press freedom but only 20 percent of the non-visual cases limited press freedom. Seventy-one percent of all the privacy cases were visual. Eighty percent of the limiting cases are visual.

To see where there might be patterns, the cases were broken into decades, then by content and then by Prosser's four torts.

Analysis by Decade

None of the breakdowns of the media cases by decade, listed in Table 6, showed significant chi square values, but there were significant binomial values in the 1950s, 1960s and 1970s. The decades that showed significant binomial values are broken out in Tables 6a., 6b. and 6c. In all groupings, the majority of cases was visual. In the early years of privacy, most picture cases lost. In the 1920s, no non-visual case lost. In the 1930s, 80 percent of the losing cases were visual. In the 1920s and 1930s, almost half of all the cases restricted the freedom of the press. In the 1940s, 33 percent of the visual cases lost and only 18 percent of the non-visual cases did. There were 39 limiting privacy cases from 1890 to 1959. Thirty-three of those (85 percent), were visual.

Only six of the 44 cases in the 1950's were non-visual and only one (17 percent) lost, whereas 32 percent of the visual cases lost. (See Table 6a.) There were significantly more cases winning and a significant difference between the visual cases which won and lost ($p<.005$).

TABLE 6. MEDIA PRIVACY CASES BY DECADE

DECADE	VISUAL EXTENDS	VISUAL LIMITS	NON-VISUAL EXTENDS	NON-VISUAL LIMITS	TOTAL
1890s	1	1	0	0	2
1900s	1	0	0	0	1
1910s	4	2	0	1	7
1920s	2	4	2	0	8
1930s	9	8	2	2	21
1940s	12	6	9	2	29
1950s	26***	12***	5	1***	44
1960s	17	10	16*	5	48
1970-78	28*	6****	14	1**	49
TOTAL	100	49	48	12	209

binomial significance: * = p<.05; ** = p<.01;
*** = p<.005; **** = p<.001. See Tables 6a, 6b. and 6c.

Non-visual cases would still win (p<.05) in the 1960s as shown in Table 6b. Thirty-seven percent of the visual cases lost compared to 24 percent of the non-visual cases. By the 1970s, the number of visual cases was still greater (69 percent), but the number limiting had begun to even out with the non-visual cases, as shown in Table 6c. Only 18 percent of the visual cases lost and seven percent of the non-visual ones lost. Most privacy cases were winning (only 14 percent lost), and both areas were winning more cases than they lost (p<.01). There were still more visual cases and they were losing more than non-visual cases were. The limiting cases were 85 percent visual.

TABLE 6a. MEDIA PRIVACY CASES: 1950s

	Extended	Limited	Total
Visual	26	12	38****
Non-visual	5	1	6
Total	31****	13****	44

binomial: **** p<.001

Table 6b. MEDIA PRIVACY CASES: 1960s

	Extended	Limited	Totals
Visual	17	10	27
Non-visual	16	5	21*
Totals	33	15	48

binomial: *p<.05

Table 6c. MEDIA PRIVACY CASES: 1970-78

	Extended	Limited	Totals
Visual	28	6	34****
Non-visual	14	1	15***
Totals	42*	7	49

binomial: * p<.05; *** p<.005; **** p<.001

Analysis by Content

There were no significances shown in the content category differences. The cases that were from situations in the "entertainment" mass media were broken out of the case list and are shown on Table 7. (38)

The chi-square test was not valid, the binomial tests indicated significant differences between

Table 7. ENTERTAINMENT CASES

	Extended	Limited	totals
Visual	77	43	120*
Non-visual	41	8	49*
totals	118*	51*	169*

Chi-square = 6.283, p<.025; binomial: * p<.005.

the visual and non-visual cases as well as between the winning and losing visual cases. Seventy-nine percent of the entertainment picture cases won. An explanation might be that that entertainment was originally not protected but was brought under the First Amendment umbrella later.

When the entertainment cases were dropped from the total, the journalism cases chi square was significant, as shown in Table 8. All the binomial tests were significant. While 16 percent of the non-visual journalism cases were lost, 36 percent of the visual cases lost. This suggests that there is a difference between the treatment of non-visual and visual cases; there were significantly more visual cases; and they restricted press freedom significantly more than non-visual cases.

Table 8. JOURNALISM PRIVACY CASES

	Extended	Limited	Totals
Visual	77	43	120*
Non-visual	41	8	49*
totals	118*	51*	169

Chi-square = 6.283, p<.025; binomial; * p<.005.

Analysis by Tort

At this point, Prosser's four torts were examined by category, as shown in Tables 9-12. Some of the cases were coded for two categories and thus the cases will add up to more than the 169 cases in Table 8. (39) All of the intrusion cases overlap with other categories.

Only one tort, Embarassing Private Facts (E.P.F.) shown in Table 11, had a significant Chi-square value. However the binomial values showed that all four torts had significantly more visual cases lose ($p<.05$ or better) than non-visual ones. This indicates a significantly greater likelihood for a visual privacy case to restrict freedom of the press. Both the Embarassing Private Facts and Appropriation torts have significantly more visual cases that won as well as lost, as shown in Tables 11 and 12. Considering that all four torts had numerically more visual cases, it was possible that all four torts of privacy were visual, which would make privacy a visual area of the law. The binomial tests indicated that this was so. All were significantly visual ($p<.05$) as shown in Table 13. It becomes clear that privacy is a visual tort.

Table 9. INTRUSION (all overlap cases)

	Extended	Limited	totals
Visual	4	7	11
Non-visual	2	0	2
totals	6	7*	13

Chi square invalid. * binomial $p<.05$

Table 10. FALSE LIGHT

	Extended	Limited	totals
Visual	5	14	19
Non-visual	3	3	6
totals	8	17*	25

Chi-square = 1.175, Invalid.; * binomial $p<.05$

Table 11. EMBARRASSING PRIVATE FACTS (E.P.F.)

	Extended	Limited	totals
Visual	61	20	81**
Non-visual	37	4	41**
totals	98*	24**	122

Chi-square = 3.84, $p<.05$; binomial: * $p<.05$; ** $p<.005$

Table 12. APPROPRIATION

	Extended	Limited	totals
Visual	11	9	20
Non-visual	1	1	2
totals	12**	10*	22

Chi square = .0183 Invalid. binomial: * $p<.05$; ** $p<.01$

Table 13. BINOMIAL TEST OF THE VISUAL TORT PREMISE

Category	Visual	Non-visual	Total	Value	Significance
All Media	149	60	209	6.087	p<.005
Journalism	120	49	169	5.384	p<.005
Entertainment	29	11	40	2.687	p<.05
False Light	19	6	25	.014*	p<.05
E.P.F.	81	41	122	3.530	p<.005
Intrusion	11	2	13	.022*	p<.05
Appropriation	20	2	22	.004*	p<.005

* = small sample table used.

This analysis indicates that it is highly probable that privacy law grew from a legal response to visual journalism. The failure of copyright law to protect the individual from candid camera exploitation in the newspapers gave birth to a new right in the law. This premise is further supported by the statistical evidence that the journalism privacy cases are primarily visual ($p<.005$), as shown in Table 13 , and that visual privacy cases were more likely to lose than non-visual ones ($p<.005$), as shown in Table 8 , limited column.

HISTORICAL ANALYSIS

Privacy Law 1890-1938

In the first seventeen years following the Warren and Brandeis law review article in 1890 (1890-1907), there were only two non-advertising privacy cases. (36) Both involved pictures of public persons; both involved true information. One was lost, the other was won. The first brought an injunction against continued use of a photograph in a newspaper. In Marks v. Jaffa, in December of 1893, the court decided that a law student who had recently been an actor had the right to stop publication of a laudatory picture in a New York German language newspaper. The newspaper, Der Wachter, had sponsored a contest to determine the most popular actor in New York. Jaffa objected, and the Superior Court of New York City enjoined the use of his picture in a popularity contest, but made no mention of the use of his name. (37)

In 1894, the first federal privacy case involved a biography and photograph of a famous inventor who had recently died. Judge LeBaron B. Colt of the First U.S. District Court of Massachusetts ruled that the inventor was a public person and, living or dead, could not prevent non-defamatory informative publications about himself.(38)

In 1903, following the loss of a privacy case by

Abigail Roberson, the New York legislature passed the New York Privacy Statute. This bill limited court action to those instances in which an individual's name or likeness was used without consent for purposes of trade. (39) If this law had been in effect when Marks v. Jaffa was decided, that court probably would have ruled in favor of Der Wachter.

The defense of newsworthiness was picked up in the first New York case which defined "news" as not for "trade purposes." In 1908, the New York World published the name and photograph of John Moser in a story that was "unpleasant but true" about Moser. Because the story was true, and therefore not libel, Moser sued for invasion of privacy. New York Supreme Court Justice James A. Betts ruled that the statute only applied to advertisements, not news.

> . . . yet I do not think it was ever intended by the Legislature that under the guise of this statute a newspaper publication could be prohibited from using or publishing the name or portrait in a single issue of a person without his consent having first been obtained. . . .If the publication of a portrait can under this statute be prohibited in a daily newspaper, the publication of a name could also be prohibited . . ., so that the publication of a daily newspaper in this state showing and giving an accurate account of occurrences throughout the civilized world would be an impossibility . . . . (40).

Then, a 1910 case brought sports pages into the newsworthiness fold that ruled that "a picture is not used for advertising purposes unless the picture is part of an advertisement. (41)

The issue of what was advertising and what was not was eased for the courts with the adoption of the Federal Newspaper Law of 1912 which said that all editorial matter published for money should be marked "advertisement." (42)

In 1911, the first non-New York newspaper case arose in Washington state. The Seattle Star published a photograph of the child Bessie Hillman in a family portrait along with an article detailing the indictment of her millionaire father for fraud. The court held that while she had been done a wrong, there was no remedy for it. (43)

The first non-advertising photographic privacy case that was lost since Marks was not a news but an exhibition case. In 1912 in Kentucky, a photographer was commissioned to make pictures of the corpses of Siamese twins by their parents. He made more than the requested twelve copies, copyrighted one and exhibited it. The court said he had invaded the right to privacy of the parents. (44)

This case fell into a category which might be called "deceptive or outrageous use" of a picture. This type of picture use accounted for the only cases where print photographs lost cases from 1900 until 1937. During this time, seven print photographs were protected as newsworthy and six were lost. (45) Print cases not involving photographs in this period were rare. From 1890 to 1939, there were six non-photographic print cases of

which two were lost. (46)

A 1933 New York case indicates the judicial attitude toward print cases and may explain why there were so few print cases. In Kimmerle v. N.Y. Evening News (1933), a woman who kept a boarding house in New York City had the bad luck to take in a boarder who had just murdered his wife. The newspaper reporter wrote the story about the circumstances of the murderer's capture to leave the impression that the murderer was "courting" this landlady. The judge in this case ruled it neither a privacy nor a libel case. He said privacy law was limited to the statutory definition. He said:

> . . . written words, invading privacy and bringing undeserved notoriety, are without remedy, unless appreciably affecting reputation. This is the domain, not of positive law, but of obedience to the unenforceable. (Law and Manners by Lord Moulton 134 The Atlantic Monthly (1)). . . . From such harm one is protected only by common decency. (47)

Until 1938, then, except for one editorial cartoon case, the newsworthiness shield protected print photographs unless they were obtained by theft or deception. The two word case losses occurred in a fiction article and an appropriation case.

However, a separate strand of the law was building up within privacy law which was to spill over into newsworthy topics. Movies, particularly newsreels and shorts, had been available to the public since 1898. This

visual entertainment was blurring the lines between news and fiction in both the public and legal mind by the use of "dramatizations" and "fictionalizations". (48)

In 1913, a movie dramatization of a shipwreck was made for entertainment purposes. In it, a heroic wireless operator was depicted doing things that were laudatory but out of character for him. The highest New York court ruled that the movie company invaded the wireless operator's privacy and sustained a libel action against the movie company as well. The camel's nose was in the tent. Non-defamatory facts about a two-year-old newsworthy event were ruled invasion of privacy. (49)

The New York Courts continued to distinguish between news or documentary movies and entertainment movies, ruling a documentary and a newsreel protected in 1915 and 1919. (50) Then, three embarrassing private facts cases arose to create precedents that still limit the media.

In 1920, the first clear "embarrassing private facts" case appeared. The exhibition in motion picture theaters of a movie of a birth by Caesarean section was enjoined by the subject of the movie. The movie, entitled "Birth", was held to be use of her likeness for purposes of trade (51). This is the beginning of a strand of New York privacy law often called "outrageous use." It really belongs in equity and

not in courts of precedent. In these cases, the courts used the legal fiction that true information is "for purposes of trade " to stop publication of embarrassing private facts.

In 1931, true information taken from a twenty-year-old public record was used to make a movie about a prostitute involved in a murder trial. The woman named in the movie had rehabilitated herself and was now married and living a quiet life. The California court ruled that the use of the true name of a rehabilitated person was an invasion. The court said that action for embarrassing private facts could be avoided if the name were not used but facts from a public record may again become private if enough time elapses and the "rehabilitation" element is present. This "rehabilitation" strand has not been picked up by other states. (52)

The following year in New York, a 17 minute travelogue of New York City was enjoined from showing because it contained a 6-second close-up of a woman selling bread and rolls to passersby for a livelihood. The woman was a widow in the Great Depression (1932). The judge enjoined the movie saying it was use of her image for purposes of trade. In reading the opinion, it becomes clear that the judge considered this woman's poverty an embarrassing private fact and that until the movie was published she had kept this fact from her family and friends. (53)

However, the law was still unclear, even in New York. In 1932 and 1933, the New York courts allowed the picture of a mother of a principal to a crime to be printed in True Detective Mysteries magazine (54) and a New York Appeals Court judge was penning the Kimmerle decision.

In 1936, two New York-based cases indicated that the Federal Courts were holding to the newsworthiness protection. (55) In 1937, three visual cases seemed to extend the bounds of newsworthiness in the New York courts. An erroneous caption on an Inquiring Photographer column that labelled a woman a "cigarette girl" was termed not invasion of privacy or libel "per se". (56) A feature photograph was termed newsworthy rather than invasion of privacy. This case involved the use of a file photo of a rope-trick artist to illustrate an article on the same subject. (57) In that same year, the New Yorker magazine published an article with a sketch about a child prodigy who did not live up to his potential. The court ruled that the adult life of a child prodigy was newsworthy. Although there was a lapse of time in this case, there was no public interest in allowing "rehabilitation" to continue as the prodigy was not a former criminal. (58)

Privacy Law 1938-1978

Then, in 1938, in an area unrelated to privacy, a change in the procedures of the Federal courts began to

affect privacy law. An opinion by Justice Louis Brandeis struck down the independence of the Federal Courts and required them to apply state law in common law areas. (59)

Also published in 1938 but copyrighted in 1939 was a new restatement of the law of torts. In it appeared the first acceptance of privacy as a separate tort. In that restatement there is mentioned a form of invasion of privacy which is now called "embarrassing private facts."

> This limitation to newsworthy persons does not prohibit to allow damages (sic) where revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency. (60)

Then in 1938 and 1939, the media lost six of the seven privacy cases. The one print case involved a fictional article in a magazine. (61) Two were variable consent cases applied to newsreels and magazine pictures. (62) In addition, the media lost two out of three embarrassing private facts cases, both of which involved true educational facts illustrated by photographs. (63) The only media privacy case which won in those two years ruled that a woman who committed suicide by leaping from an office building was, at least temporarily, an object of public interest and her picture was newsworthy. (64)

Radio lost its only non-advertising privacy case from 1890 to 1978. (65) This case extended the Binns (1913) and the Melvin (1931) precedent into radio

dramatizations. It extended the "right to be left alone" into a restriction of the use of a dramatization of true facts in connection with a true name in an entertainment format. After being established in entertainment format, the real-name plus visual-portrayal plus fictionalization then swung back into the "news" realm to plague features and documentaries.

In 1940, two non-visual privacy cases indicated that print news was still protected in New York. One opinion stated that "written words, the effect of which is to invade privacy and bring undesired notoriety are without remedy unless they affect reputation." (66)

The link-up of privacy law with print information came in 1944 in a Florida case involving non-defamatory but embarrassing private facts. Zelma Cason, characterized as an eccentric spinster, won the right to nominal damages for publication of a "word picture" about her. This occurred in a memoir by author Marjorie Kinnan Rawlings Baskin entitled Cross Creek. Cason's recovery was eventually limited to nominal damages in 1947 and has no direct progeny. (67) However, its existence influenced the extension of privacy in other states.

In 1945, a short opinion in Arizona remanded a true facts plus photograph case to trial. The judge, after reading the Restatement and Banks, Griffin and Cason, said

that invasion of privacy can be called injury to person and that a widow of a murdered newstand operator had the right to sue for publication of his photograph. (68)

This was followed by Moloney v. Boy Comics in 1946 which limited a true portrayal of the boyhood of a hero. Before Moloney was reversed in favor of the comic publisher in 1950, the same New York court declared a non-defamatory but fictionalized feature article as an invasion of privacy. The "fictionalization" was visual. An illustration that accompanied the article showed a woman holding a bouquet of roses when, in fact, the woman had refused to accept a bequeathment of a weekly bouquet of roses. The court termed the article and illustration "read as a whole, a dramatization not acceptable and beyond the scope of immunity of current or past news." (69)

The 1940s were the high-water mark for the tort of embarrassing private facts. It is the only decade in the period studied that restricts it in print except in California and in public record cases where a statute is involved. However, the California "rehabilitation" precedent does limit any national medium circulated there. In addition, the lack of distinction between the various kinds of privacy until 1953 and the proliferation of non-news related privacy actions allowed the expansion of privacy as a general tort.

The Effects of Treatises

The effects of the various legal treatises on privacy have been considerable. The 1890 law review article by Brandeis and Warren was just the beginning. In 1907, the new edition of Cooley on Torts carried a section of privacy as a separate tort. (70) Cooley doubted that it would last but said: "The question has arisen mostly in suits to enjoin or recover damages for the unauthorized use of one's name or likeness for advertising purposes." He quoted two appeals courts which criticized the right. (71)

As pointed out above, only eight news-related privacy cases were lost between 1907 and 1937 and all involved either fiction, contempt of court, use of name to advertise, theft of a picture, direct violation of a contract, and/or publication pictures of dead, deformed children (outrageous use).

In 1938, the first restatement of the law of torts included privacy in its Division Eleven publication, Chapter 42, "Interference with various protected interests." Tucked in between sections 866, "Failure to furnish facilities to a member of the public," and 868, "Interference with dead bodies," the right of privacy was mentioned. The statement said:

> A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other. (72)

Five of the six illustrations involved photographs or movies. The sixth was a case in which a newspaper reporter follows a private citizen and describes his habits. No case of record had the same set of facts as the sixth illustration. Buried in the commentary is one sentence which mentions the newsworthiness protection. "A distinction can be made in favor of news items and against advertising use." (73)

The news media began to lose cases immediately after this publication. The media lost six of the next seven privacy cases in 1938 and 1939. Cases in false light lost the next eleven cases.

In 1941, William L. Prosser published the first edition of his Handbook of the Law of Torts. Chapter 21, entitled "Miscellaneous," carried a section on "Right of Privacy." (74) In this section he begins to introduce the idea of kinds of privacy but did not formally separate them. He mentioned that "The Right is subject to a privilege to publish matters of news value, or of public interest of a legitimate character" at the end of the bold-face print first paragraph. (75)

In 1953, Prosser first published his typology of privacy divided into four torts in an article on interstate publication. He mentions the tort of appropriation without the adjective "commercial" which he had earlier used when

discussing the cases. He states: ". . . appropriation of the values of a name, picture or personality . . ." and false light as putting the plaintiff in a false but not necessarily defamatory position in the public eye. (76) In the next ten years, seven cases were lost in the area of appropriation where the information did not appear in advertising. The number of privacy cases doubled in the 1950s.

In that 1953 article, Prosser did not mention the key word "unreasonable" regarding intrusion of privacy. He again left it out in his now classic 1960 article on privacy (77) and again left it out in his 1967 draft of the A.L.I. Restatement of the Law of Torts 2d, which was held up because of the constant flux of defamation law. This version was published in tentative draft form and was the Restatement from 1967 until 1975. (78) It also contained an additional section on the public interest (news) privilege.

After Prosser's death in 1972, the Institute changed his draft. It pulled out tentative section 652 F, "Privilege to give publicity to matters of public interest" and added a caveat to the section 652 D, "Publicity given to private life" that said liability attached "if the matter publicized is not of legitimate concern to the public." The redraft also added the word "unreasonable" as an adjective to invasion (of privacy) in all sections. The

effect of this new version has yet to be seen. (79)

In 1938, the restatement of torts accepted privacy on the basis of advertising, entertainment and theft/deception cases and the news immunity was barely mentioned. In addition, the restatement did not make it clear that current cases did not involve the print journalism media and, in fact, only five cases had been decided against the news media, all visual. Two of those would be considered contempt cases today and three involved theft or deception.

It seems probable that the vagueness in Prosser's acceptance of the right of privacy and his lack of understanding of the distinction between news and advertising that the New York Courts were creating may have brought about the weakening of the newsworthiness shield against privacy law liability for journalists.

It is also possible that his typology of privacy into four distinct torts is incorrect, at least for journalism. An examination of the journalism cases indicate that although the tort of appropriation may be predictive of liability, the others do not hold true for journalism. In all cases up until 1978, intrusion has not incurred liability for journalists unless it is linked with visual protrayal AND deception. In fact, deception or lack of permission for specific use coupled with visual portrayal seems to be the most common denominator for the losing

cases in both embarassing private facts and false light. This seems to indicate that a "fairness" test is being applied to visual portrayals of private citizens. Therefore, the typology for journalism might be two torts: appropriation, and visual portrayal of embarrassing or false facts linked with deception. This second tort might be called unreasonable visual publication. Although this typology has only been constructed from data up until 1978, it is possible that the legal history of privacy can only support these two torts when the privilege of newsworthiness is invoked.

Conclusion

Don R. Pember has done a definitive analysis of the relationship between the law of privacy and the press up to 1970. (80) He stated that the right of privacy has emerged in three areas that affect the media: the use of name or image in advertisements without consent, publications about private affairs and nondefamatory falsehoods. (81)

Pember states that there were areas of privacy law that were still in confusion in 1970 and cites Barber v. Time and Melvin v. Reid as examples of a "mores" test of juries which creates the confusion. (82) It is possible that much of the confusion of the law results in the blindness of the "channel" or "medium" of the tort. The origins of the tort of privacy are visual and aural

invasion in the form of photographic and recording (eavesdropping) invasions. An analysis of media-related privacy law lends credence to this point.

The statistical and historical analysis supports the statements that privacy law grew out of a response to visual journalism and that the law of privacy as it affects journalism is primarily visual. In addition, the privacy law has been more restrictive of visual journalism than print. The statistics show that of the 169 journalism privacy cases from 1890 to 1978, 120 were visual. Over 80 percent of all restricting privacy cases were visual. Until 1938, all cases restricting the news media were visual. In the period studied, thirty-six percent of all visual cases lost whereas only 16 percent of all non-visual cases restricted press freedom. Only five non-visual cases lost before 1960.

The case law clearly shows that the sliding scale of First Amendment freedoms allowed precedents in the entertainment media that returned to harass the news industry. The right of privacy began to encroach upon the defense of newsworthiness in the visual entertainment areas in 1913. Then in 1938, the restatement of torts accepted privacy on the basis of advertising, entertainment and theft/deception cases. Later writings by Prosser downgraded the defense of newsworthiness. Also in 1938, the Erie v. Tomkins decision required Federal Courts to follow state

precedents in non-federal areas. This allowed states, such as California, to create individual laws of privacy and narrow the newsworthiness privilege. By 1939, the law of privacy had begun to encroach on the newsworthiness exemption. Embarrassing private facts was applied to radio in 1939 and print in 1944. The first non-visual false light case was lost in 1953. Intrusion lost no non-visual case in the time period studied.

Thus there is reason to believe that a lack of distinction between the forms (channels) of the invasion of privacy has obscured its historical origins and made the law of privacy more murky and more restrictive. The privilege of newsworthiness has protected print to a greater extent than news presented with visual accompaniment. In terms of journalism, privacy is a visual tort.

NOTES

1. See generally, Near v. Minnesota, 1 Med. L. Rptr. at 1007.

2. Alexander Meiklejohn, "The First Amendment is an Absolute," in The Supreme Court Review (Chicago: University of Chicago Press, 1961) pp. 245-65.

3. Claude Shannon and Warren Weaver, The Mathematical Theory of Communication (Urbana, Ill.: University of Illinois Press, 1949).

4. Zechariah Chafee, Free Speech in the United States (Cambridge, Mass.: Harvard University Press, 1941) p. 381.

5. John D. Stevens, "Freedom of Expression, New Dimensions," in Mass Media and the National Experience, ed. Ronald T. Farrar and John D. Stevens (New York: Harper and Row, 1971) p. 29.

6. John Murray, Media Law Dictionary (Washington, D.C.: University Press of America, 1978) pp. 48, 64.

7. Caroline Dow, The Response of the Law to Visual Journalism, 1839-1978, Ph.D. dissertation, Michigan State University College of Communication Arts and Sciences, March 1985.

8. The case list was created by combining the lists created by Don R. Pember for his book Privacy and the Press (Seattle: University of Washington Press, 1972); those cases listed by William L. Prosser in his first and second articles on the tort of privacy, "Interstate Publication," 51 Mich. L. Rev. 959 (1953) and "Privacy," 48 Cal. L. Rev. 383 (1960), and the listings in West's Decennial Series under literary property and privacy. These lists were almost identical except that Pember seems to have added some cases which were cited in other cases. All of Pember's cases that were hearsay, that is not of record, were dropped from the list. Then all product advertising cases and those that did not involve the mass media were dropped from the list. The cases were also coded as to whether they were fiction rather than representations of reality (news, documentary or biography) and whether they were presented as entertainment. The neutral cases included inter-media disputes such as anti-trust suits (Citizens Publishing v. U.S., 394 U.S. 131, 1969); or a license denial for deception of the FCC (FCC v. WOKO 329 U.S. 223, 1946); or advertising disputes (Friedman v. Rogers, 4 Med. L. Rptr. 2213); or copyright disputes (INS v. AP, 248 U.S. 215, 1919).

9. The following is the privacy case list: Visual privacy cases where the freedom of the press was restricted:

Afro-American v. Jaffe 366 F.2d (1966).
Annerino v. Dell Publishing Co. 149 N.E.2d 761 (1968).
Aquino v. Bulletin Co. 190 Pa.Super. 528 (1959).
Ali v. Playgirl Inc. 447 F.Supp. 723 (1978).
Banks v. King Feature Syndicate 30 F.Supp. 352 (1939).
Barber v. Time Inc. 159 S.W.2d 291 (1942).
Bazemore v. Savanna Hospital 155 S.E. 194 (1930).
Binns v. Vitagraph Co. of America 103 N.E. 1108 (1913).
Blumenthal v. Picture Classics 261 N.Y. 504 (1932).
Cantrell v. Forest City Publishing Co. 419 U.S. 245 (1974).
Commonwealth v. Wiseman 249 N.E.2d 601 (1969).
Daily Times Democrat v. Graham 162 So.2d 474 (1962).
Dietemann v. Time 449 F.2d 245 (1971).
Douglas v. Stokes 149 S.W. 849 (1912).
Durgom v. CBS 214 N.Y.S.2d 752 (1961).
Ettore v. Philco TV Broadcasting Co. 229 F.2d 481 (1956).
Ex Parte Sturm 136 Ala 312 (1927).
Feeney v. Young 181 N.Y.S. 481 (1920).
Galella v. Onassis 353 F.Supp. 196 (1972).
Griffen v. Medical Society of N.Y. 11 N.Y.S.2d 109 (1939).
Garner v. Triangle Publications 97 F.Supp. 546 (1951).
Gill v. Curtis Pub. Co. 239 P.2d 630 (1952).
Gill v. Hearst Pub. Co. 253 P.2d 441 (1953).
Goldberg v. Ideal Publications 210 N.Y.S.2d 928 (1960).
Holmes v. Underwood & Underwood 233 N.Y.S. 153 (1929).
Holmes v. Curtis Publishing Co. 303 F.Supp. 522 (1969).
Leverton v. Curtis Pub. Co. 97 F.Supp. 181, affd. 192 F.2d 974 (1951).
Marks v. Jaffa 26 N.Y.S. 908 (1893).
Martin v. Johnson Publishing Co. 157 N.Y.S.2d 409 (1956).
McNulty v. Press Pub.Co. 241 N.Y.S. 29 (1930).
Melvin v. Reid 112 CalApp 285 (1931).
Meyers v. U.S. Camera Pub. Corp. 167 N.Y.S.2d 771 (1957).
Miller v. Madison Sq. Garden 28 N.Y.S.2d 811 (1941).
Nappier v. Jefferson Standard Life Ins.Co. 322 F.Supp. 174, rev. 322 F.2d 502 (1963).
Pittera v. Parade Publications Inc. 216 N.Y.S.2d 162 (1961).
Peed v. Washington Times Co. 55 Wash L Rep. 182 (1927).
Peay v. Curtis Pub. Co. 78 F.Supp. 305 (1948).
Redmond v. Columbia Pictures Corp. 14 N.E.2d 636 (1938).
Raible v. Newsweek Inc. 341 F.Supp. 804 (1971).
Reed v. Real Detective Pub. Co. 162 P.2d 133 (1945).
Selsman v. Universal Photo Books 18 App.Div.2d 151 (1963).
Semler v. Ultem Publications 9 N.Y.S.2d 319 (1938).
Sharkey v. NBC 93 F.Supp. 987 (1950).
Stanley v. Warner Bros. Pictures 64 Ga.App. 228 (1940).
Strickler v. NBC 167 F.Supp. 68 (1958).

Sutton v. Hearst 90 N.Y.S.2d 322 (1949).
Thompson v. Close-Up, Inc. 98 N.Y.S.2d 300, aff. 99 NYS2d (1950).
Youssoupoff v. CBS Inc. 244 N.Y.S.2d 701 (1963).
Zacchini v. Scripps-Howard Broadcasting Co. 351 N.E.2d 454 (1976).

Visual privacy cases that involved a picture in which freedom of the press was extended or upheld:

Abernathy v. Thornton 263 Ala 496 (1955).
Bass v. Straight Arrow Publishers Inc. 398 N.Y.S.2d 669 (1977).
Berg v. Minneapolis Star and Tribune 79 F.Supp. 957 (1948).
Bernstein v. NBC 129 F.Supp. 817, affd. 232 F.2d 369 (1955).
Berry v. NBC 480 F.2d 428 (1973).
Bradley v. Cowles Magazines 26 Ill.App.2d 331 (1960).
Branson v. Fawcett Pub. 124 F.Supp. 429 (1954).
Brauer v. Globe Newspapers Co. 217 N.E.2d 736 (1966).
Bremmer v. Journal Tribune Pub Co. 247 Iowa 817 (1956).
Buganski v. Do-All 31 Ill.App.2d 191 (1961).
Callas v. Whisper Inc. 101N.Y.S.2d 532 (1950), affd. 278 App. Div. 974 (1951).
Cassidy v. ABC Inc. 377 N.E.2d 126 (1978).
Colyer v. Richard K. Fox Pub. Co. 146N.Y.S. 999 (1914).
Corliss v. E.W. Wallace Co. 64 F. 280 (1894).
Costlow v. Cusimano 311N.Y.S.2d 92 (1970).
Cox Broadcasting v. Cohn 430 U.S. 323 (1974).
Cullen v. Grove Press 276 F.Supp. 727 (1967).
Dallesandro v. Henry Holt & Co. 4 App.Div.2d 470 (1957).
Dauer Pittipaldi Inc. v. 21st Century Communications Inc. 349N.Y.S.2d 736 (1973).
Davis v. RKO Radio Pictures, 16 F.Supp. 195 (1936).
DeSalvo v. 20th Century Fox Film Corp. 300 F.Supp. 742 (1969).
Donohue v. McCall Corp. 51N.Y.S.2d 727 (1944).
Donahue v. Warner Bros. Pictures 194 F.2d 6 (1952).
Estell v. Hearst Pub.Co. 186 F.2d 1017 (1951).
Everett v. Carvel Corp. 334N.Y.S.2d 992 (1972).
Firth v. AP 176 F.Supp. 671 (1959).
Fogel v. Forbes Inc. 500 F.Supp. 1018 (1977).
Factors v. Pro Arts Inc. 579 F.2d 215 (1978)
Freidan v. Freidan 414 F.Supp. 77 (1976).
Freed v. Loew's Inc. 24N.Y.S.2d 679 (1940).
Gautier v. Pro-Football Inc. 90N.Y.S.2d 812, rev. 304 N.Y. 354 (1952).
Goldman v. Time Inc. 336 F.Supp. 133 (1971).
Gavrilov v. Duell Sloan and Pierce Inc. 84N.Y.S.2d 320 (1948).
Hicks v. Casablanca Records 464 F.Supp. 426 (1978).
Hillman v. Star Pub. Co. 117 P. 594 (1911).
Hull v. Curtis Pub. Co. 126 A.2d 644 (1956).

Humiston v. Universal Film Mfg. Co. 178N.Y.S. 752 (1919).
Jacova V. Southern Radio-Television Co. 83 So.2d 34 (1955).
Jeffries v. N.Y. Evening Journal Pub. Co. 124N.Y.S. 780 (1910).
James v. Screen Gems 174 Cal.App.2d 650 (1959).
Jenkins v. Dell Pub. Co. 251 F.2d 447 (1958).
Jones v. Herald Post Co. 230 Ky 227 (1929).
Kelley v. Post Publishing Co. 327 Mass. 275 (1951).
Klein v. McGraw Hill Inc. 263 F.Supp. 919 (1966).
Koussevitzky v. Allen, Towne & Heath Inc. 68 N.Y.S.2d 779 (1947).
Langford v. Vanderbilt University 199 Tenn. 389 (1956).
Leopold v. Levin 259 N.E.2d 250 (1970).
Lillie v. Warner Bros. Pictures 34 P.2d 835 (1934).
Lawrence v. Ylla 55N.Y.S.2d 343 (1945).
Levey v. Warner Bros. Pictures 57 F.Supp. 40 (1944).
Lahiri v. Daily Mirror 295N.Y.S. 382 (1937).
Man v. Warner Bros. Inc. 317 F.Supp. 50 (1970).
Martin v. New Metropolitan Fiction 260N.Y.S. 972 (1932).
Martin v. Dorton 210 Miss. 668 (1951).
Maritote v. Desilu Productions 345 F.2d 418 (1965).
Merle v. Sociological Research Film Corp. 152N.Y.S. 829 (1915).
Metter v. Los Angeles Examiner 95 P.2nd 491 (1939).
Metzger v. Dell 136N.Y.S. 888 (1955).
Middleton v. News Syndicate Co. 295N.Y.S. 120 (1937).
Miller v. NBC 157 F.Supp. 240 (1957).
Molony v. Boy Comics Publishers 65N.Y.S.2d 173 (1946), rev. 277 App.Div. 166 (1950).
Moser v. Press Pub. Co.109N.Y.S. 963 (1908).
Murray v. New York Magazine Co. 267 N.E.2d 256 (1971).
Nebb v. Bell Syndicate 41 F.Supp. 929 (1941).
Nelson v. Maine Times 373 A.2d 1221 (1977).
Neff v. Time Inc. 406 F.Supp. 858 (1976).
Namath v. Sports Illustrated 371N.Y.S.2d 10 (1975).
Oma v. Hillman Periodicals 281 App.Div. 240 (1953).
O'Hilderbrandt v. CBS 114 Cal.Rptr. 826 (1974).
Pagan v. N.Y. Herald Tribune Inc. 301 N.Y.S.2d 120 (1969).
Paulsen v. Personality Posters Inc. 299 N.Y.S.2d 501 (1968).
Rohzon v. Triangle Publications 230 F.2d 359 (1956).
Rossi v. F.W. Woolworth Co. 392 N.Y.S.2d 9 (1977).
Rawls v. Conde Nast Pub. Inc. 446 F.2d 313 (1971).
Rosemont Enterprises Inc. v. McGraw Hill Book Co. 380 N.Y.S.2d 839 (1968).
Raynor v. ABC 222 F.Supp. 795 (1963).
Samuel v. Curtis Pub. Co. 122 F.Supp. 327 (1954).
Sides v. F-R Publishing Corp. 113 F.2d 806 (1940).
Sweenek v. Pathe' News 16 F.Supp. 746 (1936).
Street v. NBC 512 F.Supp. 398 (1977), 7 Med.L Rptr. 1001 (1981).
Stillman v. Paramount Pictures 147N.Y.S.2d 504, aff 2 App.Div.2d 18 (1956).
Stryker v. Republic Pictures Corp. 283 P.2d 690 (1951).

Stafford v. Hayes 327 So.2d 871 (1976).
Smith v. Suratt 7 Alaska 416 (1926).
Smith v. NBC 292 P.2d 600 (1956).
Taylor v. KTVB 525 P.2d 984 (1974).
Themo v. New England Newspaper Pub. Co. 27 N.E.2d 753 (1940).
Thayer v. Worcester Post Co. 187 N.E. 292 (1933).
Time Inc. v. Hill 385 U.S. 374 (1967).
Travers v. Paton 261 F.Supp. 110 (1966).
Truxes v. Kenco Enterprises 119 N.W.2d 914 (1963).
University of Notre Dame v. 20th Century Fox 15 N.Y.2d 940 (1965).
Virgil v. Sports Illustrated 424 F.Supp. 1286 (1976).
Wagner v. Fawcett Publishing 307 F.2d 409 (1962).
Wallace v. Weiss 372 N.Y.S.2d 416 (1975).
Wallach v. Bacharach 80 N.Y.S.2d 37 (1948).
Waters v. Fleetwood 212 Ga. 161 (1956).
Weeren v. Evening News Assn. 152 N.W.2d 676 (1967).
Williams v. KCMO Broadcasting 472 S.W.2d 1 (1971).
Wright v. RKO Radio Pictures 55 F.Supp. 639 (1944).

Non-visual privacy cases where the freedom of the press was restricted:

Cason v. Baskin 30 So.2d 635 (1947).
Conklin v. Sloss 150 Cal.Rptr 121 (1978).
Eliot v. Jones 120 N.Y.S. 989 (1910).
Hazlett v. Fawcett Publications Inc. 116 F.Supp. 538 (1953).
Krieger v. Popular Publications 3 N.Y.S.2d 480 (1938).
Leavey v. Cooney 498 F.2d 823 (1963).
Mau v. Rio Grande Oil Inc. 28 F.Supp. 845 (1939).
Patterson v. Tribune Co. 146 So.2d 623 (1962).
Spahn v. Julian Messner Inc 250 N.Y.S.2d 529 (1964).
State v. Evjue 33 N.W.2d 305 (1948).
Thompson v. G.P. Putnam and Sons 243 N.Y.S.2d 652 (1963).
Varnish v. Best Medium Pub.Co. 405 F.2d 608 (1968).

Non-visual privacy cases in which the freedom of the press was extended or upheld:

Ayres v. Lee Enterprises Inc 561 P.2d 998 (1977).
Barbieri v. News Journal Pub.Co. 189 A.2d 773 (1963).
Bell v. Courier Journal and Louisville Times 402 S.W.2d 84 (1966).
Benson v. Fla Pub. Co 262 So.2d 196 (1972).
Beresky v. Teschner 381 N.E.2d 979 (1978).
Birmingham v. Daily Mirror 23 N.Y.S.2d 549 (1940).
Brisco v. Readers Digest 483 F.2d 34 (1971).
Carlisle v. Fawcett Pub. Inc. 201 Cal.App.2d 733 (1962).

Cohen v. Marx 94 Cal.App.2d 704 (1949).
Cordell v. Detective Pub Inc. 307 F.Supp. 1212 (1968).
Curry v. Journal Pub.Co. 68 P.2d 168 (1937).
Dameron v. Doubleday and Co. 231 N.Y.S 444 (1928).
Estate of Hemingway v. Random House 268 N.Y.S.2d 531 (1966).
Elmhurst v. Pearson 153 F.2d 467 (1946).
Fignole v. Curtis Publishing Co. 247 F.Supp. 595 (1965).
Goelet v. Confidential 5 App.Div.2d 226 (1958).
Herrick v. Evening Exp. Publishing Co. 120 Me 138 (1921).
Hendrickson v. California Newspapers Inc. 121 Cal.Rptr 429 (1975).
Hubbard v. Journal publishing Co. 69 N.M. 473 (1962).
Hurley v. Northwest Publications Inc. 273 F.Supp. 967 (1967), affd. 398 F.2d 346 (1969).
Johnson v. Scripps Publishing Co 18 Ohio Ops. 372 (1940).
Johnson v. Harcourt Brace Jovanovich Inc. 118 Cal.Rptr 370 (1974).
Kapellas v. Kofman 459 P.2d 912 (1969).
Kimmerle v. N.Y. Evening News 186 N.E. 217 (1933).
Logan v. District of Columbia 447 F.Supp. 1328 (1977).
Ladany v. William Morrow & Co. Inc. 465 F.Supp. 870 (1978).
Liberty Lobby v. Drew Pearson 390 F.2d 491 (1968).
Mahaffey v. Official Detective Stories Inc. 210 F.Supp. 251 (1962).
McNutt v. N.Mexico St.Tribune Co. 538 P.2d 804 (1975).
Meehan v. Newsday Inc. 387 N.Y.S.2d 13 (1976).
Meeropol v. Nizer 560 F.2d 1061 (1977), cert. den. 434 US 1013.
Meetz v. AP 95 S.E.2d 606 (1956).
Memphis Pub.Co. v. Nichols 569 S.W.2d 412 (1978).
Middlebrooks v. Curtis Pub.Co. 281 F.Supp. 1 (1968).
Milner v. Red River Valley Pub. Co. 249 S.W.2d 227 (1952).
O'Connell v. The Hartford Times 15 Conn.Supp. 85 (1947).
Poteet v. Roswell Daily Record 584 P.2d 1310 (1978).
Pearson v. Dodd 410 F.2d 701, cert. den. 89 St.Ct. 2021 (1969).
People v. Scribner's Sons 130 N.Y.S.2d 514 (1954).
Rand v. Hearst Corp. 298 N.Y.S. 405 (1969).
Reardon v. News Journal Publishing Co. 164 A.2d 263 (1960).
Ross v. McFadden Publications (1940) 22 N.Y.S.2d 519 (1940).
Schnabel v. Meridith 378 Pa. 609 (1954).
Shostakovich v. 20th Century Fox Film Corp. 80 N.Y.S.2d 575 (1948).
Smith v. Doss 251 So.2d 118 (1948).
Toscani v. Hersey (1946) 65 N.Y.S.2d 814 (1946).
Werner v. Times Mirror Co. 14 Cal.2d 208 (1961).
Young v. That Was The Week That Was 423 F.2d 265 (1971).

10. Sidney Siegel, Nonparametric Statistics for the Behavioral Sciences (New York: McGraw-Hill Book Co. 1956) pp. 42-47.

11. Siegel, pp. 36-42.

12. Siegel, p. 46.

13. Siegel, pp. 38-40.

14. J. Willard Hurst, Law and the Conditions of Freedom in Nineteenth Century United States (Madison, Wisc.: University of Wisconsin Press, 1956) p. 5.

15. Lyman Ray Patterson, Copyright in Historical Perspective (Nashville: Vanderbilt University Press, 1968); Frederick S. Siebert, Freedom of the Press in England, 1476-1776 (Urbana: University of Illinois, 1952), pp. 301-4.

16. Prosser, "Privacy."

17. Ibid., p. 400.

18. Ibid., p. 390.

19. Ibid., p. 392.

20. Ibid., p. 424.

21. Philippa Strum, Brandeis, Justice for the People (Cambridge, Mass.: Harvard University Press, 1984) p. 37.

22. Rochester v. Roberson Folding Box, 64 N.E. 442, 1902.

23. New York Civil Code, Civil Rights Law, Section 50 Right of Privacy (and companion Section 51 on Action ... and New York Criminal Code, 1953), "A person, firm or corporation that uses for advertising purposes or purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such a person... is guilty of a misdemeanor." The original law was passed on April 7, 1903.

24. Pember, Privacy and the Press, p. 67.

25. Mackenzie v. Soden Mineral Springs Co. 18 N.Y.S. 240, 1891.

26. Moore v. Rugg 44 N.W. 141 (1890); Pollard v. Photographic Co. 40 Chan. Div. 345 (Great Britain, 1888).

27. Press Publishing Co. v. Falk 59 Fed. 324 CCSD N.Y., 1894.

28. See generally: Edwin Emery, The Press and America, 4th ed. (Englewood Cliffs, N,J.: Prentice-Hall, 1978); Sidney Kobre, The Yellow Press and the Gilded Age of Journalism (Tallahassee: Florida State University, 1964).

29. Emery, Press and America, p. 235.

30. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", 4 Harvard Law Review 93.

31. Ibid.

32. Donald L. Smith, "Privacy, the Right that Failied," Columbia Journalism Review, Spring 1969, pp. 18-22.

33. Prosser, "Privacy," pp. 194-6, 210, 211.

34. Entertainment Mode cases; (+) denotes case "won" by media, (-) case "lost", (*) visual case:

Embarrassing Private Facts

-*	Melvin (1931)	+*	Smith (1956)
-*	Mau (1939)	+*	Miller (1957)
+*	Wright (1944)	+*	Raynor (1963)
+*	Toscani (1946)	+*	Martote (1965)
+*	Molony (1946)	+*	Weeren (1967)
+	Cohen v Marx (1949)	+*	Leopold (1970)
+*	Stryker (1951)	+*	O'Hilderbrandt (1974)
+*	Donahue (1952)	+*	Street (1977)
+*	Bernstein (1955)	+*	Hicks (1978)

Appropriation

+	Dameron (1928)	+*	James (1959)
+*	Lillie (1934)	-	Durgom (1961) TV
+*	Davis (1936)	-	Leavey (1963) movie
-	Krieger (1938)	+*	U. of Notre Dame (1965)
+*	Fried (1940)	+*	Paulsen (1968)
+*	Levey (1944)	+	Middlebrooks (1968)
+	Shostakovich (1948) movie	+*	Factor (1978) poster
+	People (1954)	+	Ladany (1978)

False Light

-*	Binns (1913)	-*	Strickler (1958)
-*	Stanley (1940)	-	Thompson (1963)
+*	Stillman (1956)	-*	Youssoupoff (1963)

35. The following are the cases which overlapped in two categories:

Ex Parte Sturm (1927) E.P.F., intrusion
Peed v. Washington Times Co. (1927) E.P.F., intrusion
Bazemore v. Savannah Hospital (1930) E.P.F., intrusion
McNulty v. Press Pub. Co. (1930) E.P.F., appropriation
Blumenthal v. Picture Classics (1938) E.P.F., intrusion
Semler v. Ultem Pub. (1938), false light, appropriation
Barber v. Time (1942) E.P.F., intrusion
Berg v. Minneapolis Times (1948) E.P.F., intrusion
Martin v. Dorton (1951) E.P.F., intrusion
Ettore v. Philco TV Broadcast. (1956), E.P.F., appropriation
Thompson v. G.P. Putnam (1963) false light, appr. ENTERTAIN.
Liberty Lobby v. Drew Pearson (1968) E.P.F., intrusion
Pearson v Dodd (1969) E.P.F. intrusion
Dietteman v. Time (1971) E.P.F., intrusion
Rawls v. Conde Nast Pub. Inc. (1971) E.P.F., intrusion
Raible v. Newsweek (1972) E.P.F., appropriation
Galella v. Onassis (1972) E.P.F., intrusion
Virgil v. Sports Illustrated (1976) E.P.F., appropriation
Cassidy v. NBC, Inc. (1978) E.P.F., intrusion
Ali v. Playgirl (1978) E.P.F., appropriation

36. The entertainment cases have been included in the historical analyses.

37. Marks v. Jaffa, 1893.

38. Don R. Pember, Privacy and the Press (Seattle: University of Washington Press, 1972), pp. 61-2; Corliss v. E.W. Wallace Co., 1894.)

39. Ibid., p. 67. This law was ruled constitutional in Wyatt v. James McCreery Co. 126 App.Div. 650 (1908) and Rhodes v. Sperry and Hutchison, 193 N.Y. 223, affd. 220 U.S. 502 (1910).

40. Ibid., p. 69; Moser v. Press Publishing Co. 109 N.Y.S. 963, 1908.

41. Jeffries v. N.Y. Evening Journal Publishing Co. , 1910; Earlier that year, a New York Court had ruled that a publisher could not use the name of the President of Harvard on a five-foot shelf of children's books without his permission. This was a classic case of appropriation and use of a name for trade or profit (Eliot v. Jones, 1910). This was the first non-photographic case and it resulted in use-of-name being called "used for trade."

42. Edwin Emery and Michael Emery, The Press and America, 4th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1978), p. 272.

43. Hillman v. Seattle Publishing Co., 1911.

44. Douglas v. Stokes, 1912.

45. Won:
1.) A trick diver in the National Police Gazette (Colyer v.Richard K. Fox Pub. Co., 1914).
2.) Widow of man killed by muggers (Jones v. Herald Post, 1929).
3.) Mother of principal of a crime (Martin v. New Metropolitan Fiction, 1932).
4.) Woman pictured with her chauffeur who was named as co-respondent in her divorce action (Thayer v. Worcester Post Co., 1933).
5.) Girl mistakenly captioned as cigarette girl (Middleton v.News Syndicate, 1937).
6.) Rope-trick artist in feature (Lahiri v. Daily Mirror, 1937).
7.) Sketch of child prodigy 20 years later (Sides v. F-R Publishing Corp., 1937).

Lost:
1.) Photograph of dead Siamese twins parents paid for photos and photographer made extras uglas v. Stokes, 1912).

2.) Contempt by photograph case; photos were secretly taken and published after judge had banned cameras (Ex Parte Sturm, 1927).
3.) Publication of photo of woman nearly asphyxiated by gas; photo stolen from her home (Peed v. Wash. Times Co., 1927).
4.) Photographs published after photographer paid to take social photographs (Holmes v. Underwood & Underwood, 1929).
5.) Photograph of corpse of child born with heart outside body; taken without parent's consent and published in newspaper (Bazemore v. Savannah Hospital, 1930).
6.) A sixth visual case involved an editorial cartoon published in the New York World in 1930. The judge ruled the cartoon was not libelous and use in a newspaper was permissible. However, sale of the cartoon for syndication, use in other newspapers, was for purposes of trade and was appropriation of a name and likeness for profit. The further sale of the cartoon was enjoined (McNulty v. Press Pub. Co., 1930).

46. The cases were:
1.) Use of prominent name on Five Foot Shelf of Books ruled use of name for trade (Eliot v. Jones, 1910).
Two fiction pieces:
2.) Use of name "Little Wayne Dameron" in novel Show Boat ruled newsworthy (Dameron v. Doubleday, 1928).
3.) Use of name of professional boxer Solly Krieger over 100 times in 20-page fiction magazine article ruled use of name for trade (Kreiger v. Popular Publications, 1938).
4.) and 5.) No recovery for false publication of death of relative reported in newspaper (Herrick v. Evening Exp. Pub. Co., 1921; Curry v. Journal Pub. Co., 1937).
6.) No recovery for non-defamatory use of name in newsworthy newspaper article (Kimmerle v. N.Y. Evening News, 1933).

47. Kimmerle v. N.Y. Evening News, 1933.

48. Entertainment movies were given lesser protection in the censorship realm until the 1952 case of Burstyn Inc. v. Wilson, 343 U.S. 495, 1952.

49. Binns v. Vitagraph Co. of America, 1913.

50. Merle v. Sociological Research Film Corp., 1915; Humiston v. Universal, 1919.

51. Peeney v. Young, 1920.

52. Melvin v. Reid, 1931.

53. Blumenthal v. Picture Classics, 1932.

54. Martin v. True Metropolitan Fiction, 1932.

55. Davis v. RKO Radio Pictures, 1936; Sweenek v. Pathe News, 1936.

56. Middleton v. New Syndicate Co., 1937.

57. Lahiri v. Daily Mirror, 1937.

58. Sides v. F.R. Publishing, 1937.

59. Erie R.R. Co. v. Harry J. Tomkins 304 U.S. 64, 1938.

60. American Law Institute, Restatement, Torts sec. 867 (d) illustration 6, 1939.

61. Krieger v. Popular Publications, 1938. A fiction magazine article used the name of the boxer Solly Krieger over 100 times in a 20 page article.

62. Redmond v. Columbia Pictures Corporation, 1938; Semler v. Ultem Publications, 1938.

63. Griffen v. Medical Society of State of New York, 1939; Banks v. King Features Syndicate, 1939.

64. Mettler v. Los Angles Examiner, 1939.

65. Mau v. Rio Grande Oil, Inc., 1939.

66. Ross v. MacFadden Publications, 1940; Birmingham v. Daily Mirror, 1940.

67. Cason v. Baskin, 1944, 1947.

68. Maloney v. Boy Comics, 1946, 1950.

69. Sutton v. Hearst, 1949.

70. John Lewis, ed., Cooley on Torts, Student's Edition (Chicago: Callaghan and Co., 1907), sec. 101, pp. 192-5.

71. Ibid., p. 192.

72. American Law Institute, Restatement of the Law of Torts, Vol. IV, 1938, Section 867, pp. 398-402.

73. Ibid., The reporter (writer) for section 11 was listed as Warren A. Seavey ed., Harvard University Law School.

74. William L. Prosser, Handbook of the Law of Torts (St. Paul, Minn.: West Publishing Co., 1941) pp. 1050-62.

75. Ibid., p. 1050.

76. Prosser, "Interstate Publication."

77. Prosser, "Privacy."

78. American Law Institute, Restatement of the Law Second, Torts, Tentative Draft No. 13.

79. American Law Institute, Restatement of the Law Second, Torts, Tentative Draft No. 21: Division Five, Defamation, and Division Six A, Privacy (Philadelphia: The American Law Institute, April 5, 1975, KF1249A39 no. 21) 4025 Chestnut St., Philadelphia, Pa. 19104.

80. Don R. Pember, Privacy and the Press (Seattle: University of Washington Press, 1972).

81. Ibid., p. 233.

82. Ibid., p. 228.